S ABIRAMI SELVAM v. PP

HIGH COURT MALAYA, TAIPING
MUNIANDY KANNYAPPAN JC
[CRIMINAL APPEAL NO: AB-41S-7-08-2020]
20 DECEMBER 2021

Abstract – *In a charge of dangerous driving under s. 41(1) of the Road Transport Act 1987, where the defence has countered the prosecution's version of how the accident had come about with his own version, it falls on the learned Magistrate to evaluate the defence version, then juxtapose it with the narrative of the prosecution witnesses and decide whether the defence has indeed raised a reasonable doubt to the prosecution case; it is not sufficient for the trier of facts to merely conclude that he did not believe the accused's version, or that it was not convincing or that it could not be the truth.*

ROAD TRAFFIC: *Accident – Liability – Accident involving car and bus – Car driver found guilty under s. 41(1) of Road Transport Act 1987 ('RTA') – Heavy reliance placed on testimony of prosecution witnesses – Whether there were doubts in evidence of prosecution witnesses – Whether all evidence considered – Whether Magistrate sufficiently considered evidence by car driver – Whether car driver's defence discredited by prosecution – Whether Magistrate's stand that defence was bare denial led to failure of justice – Whether core ingredient of dangerous driving under s. 41(1) of RTA established*

In an accident involving a Proton Saga car and a bus, a passenger of the bus was killed. The car driver, Abirami ('accused') was found guilty as charged under s. 41(1) of the Road Transport Act 1987 ('RTA'). The essence of the charge that was considered by the court were (i) that the accused drove in a dangerous manner, thus putting the other road users in danger; and (ii) as a result, an accident occurred which caused the death of one passenger. The accused was thus convicted for the offence under s. 41(1) of the RTA and sentenced to 30 months' imprisonment from the date of conviction, and a fine of RM5,000 in default of payment, to be imprisoned for six months and the driving licence of the accused to be endorsed and suspended for a period of three months. The testimonies of SP21, SP2 and SP4, relied on heavily by the Magistrate, was that they saw the car losing control and moving to the right side of the road and steered back to the left and this was when it hit the right front side of the bus. After the first impact, the car swerved and hit the same spot of the bus again, forcing the bus off the road. It was alleged that after the second collision, the car was out of control and was hit by the bus at the rear left. In total, it was decided that the car caused the accident.

Held (allowing appeal; substituting conviction for offence under s. 41(1) of the RTA to one under s. 43(1) of the RTA):

(1) The Magistrate had fallen into grave error when he chose to accept the evidence of the prosecution witnesses without considering the evidence available *in toto*. He did not evaluate the testimony of the accused in its entirety, thus falling short of maximum evaluation. The Magistrate concluded that the defence advanced by the accused was a bare denial, when it was not. The defence of the accused, in essence, was that the accident happened because she had lost control of her car when the bus had first grazed on to the rear part of her car, leading to the accident. As a result, her car knocked onto a divider, causing damage to the right fender of her car. It was erroneous on the part of the Magistrate to merely conclude he did not believe the version of the accused, as it was unconvincing and could not be the truth. His salutary duty as a trier of fact is to evaluate her version of the accident juxtaposed with that of the prosecution witnesses, especially bus driver, SP3, and conclude if it had raised a reasonable doubt on the case of the prosecution or her guilt. The failure by the Magistrate amounted to a gross misdirection, which had prejudiced the accused, thus occasioning failure of justice. (paras 14 & 15)

(2) Additionally, there had not been judicial appreciation of evidence by the Magistrate. The Magistrate rejected the explanation by the accused without cogent reasons and testing it against the possibilities of the case. Her account was not discredited by the prosecution. It was merely a conjecture by the prosecution witnesses that the accused had lost control of her car, but what caused it to happen was not known by them. The prosecution witnesses were mere spectators who were on the road at the relevant time. To label them as eye-witnesses was erroneous. Also, their presence at the back of the car was denied by the accused and their evidence in court was dubious. Hence, their testimonies ought to have been treated by the court with caution. (paras 17 & 18)

(3) The Magistrate too failed to consider the apparent fact as to whether the death of the passenger, who was seated inside the bus, was immediately caused by the accused, who was alleged to have driven her car dangerously, or was it only a remote cause, considering the obvious fact that the bus was naturally a bigger vehicle plying on the road, compared to the accused's car which was only a sedan Proton. It was also in evidence that, as the door to the bus was not closed, when its driver, SP3, lost control of the bus, the seat where the passenger was seated, dislodged itself, and she flung out of the bus and was found underneath the bus. Therefore, the bus driver was also negligent in ensuring the safety of the passengers, including the deceased, to travel safely on it at all times. (paras 19 & 20)

(4) The prosecution had to show that the accused was driving in a manner which had shown a selfish disregard for the safety of other road users, an element that was conspicuously absent in the prosecution's case. Thus, the core ingredient of dangerous driving under s. 41(1) of the RTA had not been proven beyond reasonable doubt. Further, there could be no finding of guilt of the accused at the end of the prosecution's case. Such finding by the Magistrate was an incurable illegality pursuant to s. 422 of the Criminal Procedure Code which had prejudiced the accused, occasioning a failure of justice. (paras 20 & 21)

(5) The Magistrate had fallen into error in failing to give sufficient consideration to all the facts before concluding on the guilt of the accused. Pursuant to the errors by the Magistrate on the facts, evidence and law, the finding of guilt and conviction of the accused was wrong in law. Hence, the conviction of the accused was set aside. However, based on evidence, the accused had driven her car without due care and attention and had thus committed an offence under s. 43(1) of the RTA. In the circumstances, the conviction of the accused was substituted with one under s. 43(1) of the RTA and the accused was sentenced to a fine of RM10,000, in default of payment, six months' imprisonment. (paras 22-26)

Case(s) referred to:
Ajay Kumar Ghoshal v. State of Bihar (2017) 12 SCC 899 ***(refd)***
Cantona Lim Xiang Kim v. PP [2020] 1 CLJ 63 CA ***(refd)***
Gangula Ashok v. State of AP (2000) 2 SCC 504 ***(refd)***
Hafizullah Abdul Samad v. PP (MPRJ No. W05(M)-134-04-16) (Unreported) ***(refd)***
Krishnan v. PP [1948] MLJ 12 ***(refd)***
Lai Tin v. PP [1938] 1 LNS 36 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Chua Seng Huat [1999] 6 CLJ 590 HC ***(refd)***
PP v. P G Mills [1955] 1 LNS 97 CA ***(refd)***
Ramiah v. PP [1972] 1 LNS 120 HC ***(refd)***
Ulkha Kolhe v. State of Maharashtra (1964) 1 SCR 926 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 169(2), 173(ha), (m), 316(b)(ii), 422
Road Transport Act 1987, ss. 41(1), (4), 43(1)

For the appellant/accused - P Ravee; M/s P Ravee & Co
For the respondent/prosecution - Azrul Faidz Abdul Razak; DPP

[Editor's note: Appeal from Magistrate's Court, Taiping; Arrest Case No: AB-83-205-05-2019.]

Reported by S Barathi

A

JUDGMENT

Muniandy Kannyappan JC:

Background Facts

B **[1]** To recap, it was an accident case involving a Proton Saga car no. AFB5421 (referred to as car/Saga interchangeably) and bus no. JRR9199. At the relevant time, both vehicles were travelling with the bus on the left and the car to its right. The accident took place at North-South Expressway, near Bukit Gantang on 22 March 2019. One Thai national on the bus was killed in the mishap. The case was heard at the Taiping C Magistrate's Court and the car driver, S Abirami was found guilty as charged under s. 41(1) of the Road Transport Act 1987 (Amended 1999) (RTA; Act 333).

[2] The court had considered the essence of the charge that:

D (i) driver of the Saga drove in a dangerous manner, thus putting the other road users in danger;

(ii) as a result of the dangerous driving, an accident with a bus occurred which caused the death of one passenger.

E **Findings By Magistrate And Issues Arising**

[3] The Magistrate decided based on several factors. Firstly, he relied heavily on testimonies of prosecution witnesses, SP1, SP2 and SP4. Secondly, he shored up their testimonies with evidence and reports proffered by Puspakom officer, SP7 and chemist, SP9.

F **[4]** The testimonies of SP1, SP2 and SP4 were almost identical; they saw the car losing control and moving to the right of the road. Then, the car was steered back to the left and this was when it hit the right front side of the bus. After this first impact, the car swerved and hit the same spot of the bus again, this time, the force of the second collision forced the bus off the road. It was G alleged after the second collision; the car was also out of control and was hit by the bus at the Saga's rear left.

[5] SP7 reported damage to the car, included its front left fender, together with left rim and tyre. Therefore, in line with the collision of the car with the front right side of the bus. The right fender of the car was also damaged. H A point of doubt here, how did this occur? Following SP1, SP2, SP4's account, the car did not hit the road divider. SP7's explanation to this was that damage to the left fender could have affected the right part too. Is that possible?

I **[6]** As for SP9, the chemist, her report pointed out paint sample of the car was on the tyre of the bus. Additionally, the paint sample from the bus was on the left side of the Saga, thus confirming the point of contact between both vehicles. However, there was no explanation as to how the graze mark

appeared at the back left of the car and no analysis was done on the paint marks found at that spot. Added to this, the bumper of the bus was never located. It could have shed some light as to whether the bus had indeed rear-ended the car in the first place. Hence, the begging question is what was the cause of the graze mark?

[7] The witnesses testified they were able to see the sequence of the accident as their car was about a "two-cars" distance at the back of the Saga. They, however, did not see the bus rear-ending the Saga as claimed by the accused, Abirami. It was maintained that the bus was alongside the Saga when the accident occurred.

[8] This was in direct contrast with the version of SP3, the driver of bus and Abirami's account. SP3 reported that he had heard a loud noise from the rear prior to the first and second collision and admitted, he could not see the car as it was alongside the bus, whilst Abirami was adamant that the bus was at her left and had hit her car.

[9] Abirami's account was clear too as she said there were no vehicles behind her car. So, where was the car with SP1, SP2 and SP4 inside it. She had also testified her car was hit from behind and she saw the bus on her left. However, her version on sequence leading to the accident was doubted by court.

[10] The Magistrate justified reliance on the prosecution witnesses, as they were ordinary and independent witnesses. It was put to them by defence, they had an interest in the case as per insurance claim but, it was denied. However, the said allegation was unsupported by evidence.

[11] In sum total, it was decided that the Saga caused the accident. Nonetheless the grey was, what actually spurred the car to go out of control, was it the bus that hit the car first or Abirami's fault?

[12] In a nutshell, the following is distilled from evidence of prosecution witnesses, SP1, SP2 and SP4, which this court finds dubious, for the following reasons:

(i) They saw the car losing control and moving to the right of the road. But they could not testify as to what had caused the car to lose control? Could it be that the bus had rear-ended the car?

(ii) The car steered back to the left and this was when it hit the right front side of the bus.

(iii) The car had swerved and hit the same spot of the bus again, this time the force of collision forced the bus off the road. Could the force of the car be so hard for the bus to lose control?

(iv) After the second collision; the car again went out of control and was hit by the bus at its rear left. Did the bus driver cause the dangerous situation?

A **Proof**

[13] Where the accused is charged with causing death by dangerous driving of her car, the prosecution must prove that she was responsible for some act or omission while driving the car which showed carelessness or lack of consideration to the rights of other road users, including the bus driver who
B was driving on the same road. The only conclusion has to be that the act or omission amounted to dangerous driving. It is essential to elicit evidence to show the actual situation with which the accused was faced in relation to her speed and other factors of driving (as specified in the charge) and whether she got into that situation through her own or another's carelessness or rashness.
C The fact a passenger was killed who was seated inside the bus is not *ipso facto* conclusive of dangerous driving.

[14] In the present case, the trial Magistrate had fallen into a grave error when he chose to accept the evidence of prosecution witnesses without considering the evidence available *in toto*. He did not evaluate testimony of
D the accused in its entirety, thus falling short of maximum evaluation. To crown it all, he had concluded the defence advanced by the accused as a bare denial when it is not. The accused did not merely deny the accident but had categorically stated that it was caused because the bus which was to her left, had grazed on to the back of her car first. That led her to lose control and
E collide with the bus. She had supported her position by lodging a police report, D17, as well as a photo taken by her reproduced at p. 13 of the record of appeal, vol. 3. If her version is amply considered, the necessary conclusion would be that the accident took place due to negligence of the bus driver and not the accused. There is no reasoning on record, as to why her
F version was not adequately considered by the Magistrate, when it was given under oath, and cross-examined at length. After cross-examination, she had emerged unscathed. That should have prompted the Magistrate to take her version into account together with evidence tendered by prosecution and evaluate it accordingly, before concluding how the accident had taken place.

G **[15]** To iterate, her defence in essence, was that the accident happened because she had lost control of her car when the bus had first grazed on to the rear part of her car, thus leading to the accident. As a result of the grazing, her car had knocked on to a divider, which had caused damage to the right fender of her car. That would be a more probable story on how the right
H fender was damaged, opposed to testimony of SP7, who had stated that the damage was simultaneously caused because of damage to the left fender.

[16] Considering defence of the accused, she had responded to the charge against her. In that respect, it is erroneous on the part of trial Magistrate to merely conclude he does not believe the version of the accused, as it was
I unconvincing and could not be the truth. His salutary duty as a trier of fact is to evaluate her version of the accident juxtaposed with that of the prosecution witnesses, especially bus driver SP3 and conclude if it has raised a reasonable doubt on the case of prosecution or her guilt. This is in accord

with the law laid down in the absolute authority of *Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263. Failure by Magistrate amounts to gross misdirection, which has prejudiced the accused occasioning failure of justice.

[17] Additionally, there has not been judicial appreciation of evidence by the trial Magistrate. Guidance on mode and manner of judicial appreciation of evidence could be derived from the *dictum* of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, where it was decided:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence, if there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

Flowing from that, it is crystal clear the Magistrate rejected explanation by the accused, without cogent reasons and testing it against the probabilities of the case. He missed the stark fact that it was the accused who was driving the car with the bus to her left and not the prosecution witnesses, who were only at the back of her car. Thus, what actually happened on the road was unknown to them. It was merely a conjecture by them that the accused had lost control of her car, but what caused it to happen is not known by them. Evidentially, it was filled in by the accused who had explained clearly to the court what had led her to lose control of her car at the relevant time.

[18] The prosecution witnesses, were mere spectators, who were on the road at the relevant time by chance. Thus, to label them as eye-witnesses is erroneous, as for all intents and purposes, they could not perceive how the accident had taken place *in toto*, especially so on how did the car lose control and collided into the bus. Moreover, their presence at the back of the Saga, was denied by the accused. Thus, for them to be so sure that the car was dangerously driven by the accused and to have caused the accident, is in fact beyond fathom, as their testimony were of the same rhyme, as if they had rehearsed before coming to court. Their evidence in court which supposedly tallies with possibility that they were trailing the accused's car, *per se* raises eyebrows, as it seems they were watching the accused like a hawk, and waiting for an accident to happen. That is dubious. In that respect, their testimony ought to have been treated by the court with caution. To also compare and choose their testimony over the accused is erroneous, as all

witnesses who testify in court, including the accused are presumed to be telling the truth. If otherwise, the prosecution could have embarked on an attempt to impeach her credibility, in absence of which, the trial Magistrate has to consider her explanation carefully and not to dismiss it perfunctorily. Since she is not discredited by the prosecution, she is presumed to have advanced same explanation on the accident, from point of investigation until her testimony in court. (See: *PP v. Chua Seng Huat* [1999] 6 CLJ 590; [1999] 3 MLJ 305).

[19] The Magistrate too had failed to consider the apparent fact, whether death of the passenger who was seated inside the bus was immediately caused by the accused who is alleged to have driven her car dangerously or was it only a remote cause, considering the obvious fact that the bus is naturally a bigger vehicle plying on the road, compared to the accused's car which was only a sedan Proton. Her version of the accident that she felt a tremor at the rear of her car when she was passing by the bus is a logical explanation as it coincides with the law of motion, when a bigger and heavier object with speed passes by a smaller and lighter object, the smaller one would definitely face that effect. Therefore, in sum total, premised on the body of evidence available, prosecution had failed to prove dangerous driving on the part of the accused resulting in the accident for her to be found guilty and convicted under s. 41(1) RTA. (See generally: *Lai Tin v. PP* [1938] 1 LNS 36; [1939] MLJ 248; *Krishnan v. PP* [1948] MLJ 12; *PP v. P G Mills* [1955] 1 LNS 97; [1971] 1 MLJ 4).

[20] It was propounded in the oft-quoted authority *Ramiah v. PP* [1972] 1 LNS 120, on this province of the law, that merely because an accident happened leading to a fatal consequence, it follows that the accused was driving in a manner dangerous to the public. To quote Her Ladyship Tengku Maimun Tuan Mat JCA (now our Chief Justice) from the case of *Cantona Lim Xiang Kim v. PP* [2020] 1 CLJ 63 at p. 73, the prosecution has to show something more, ie, that the accused was driving in a manner which has shown a selfish disregard for the safety of other road users. Similar to that case, presently on the facts, that element was conspicuously absent in the case of prosecution. Thus, the core ingredient of dangerous driving under s. 41(1) RTA has not been proved beyond reasonable doubt by the prosecution. As alluded to earlier, the death of the passenger in the bus could only be the remote cause of the accident and not independently related to the accident cum collision with the bus involving the accused. It is also apparent from the evidence proffered during trial, there was an intervening cause which contributed to it and when viewed objectively, could not be said to be the fault of the accused. (See again: *Ramiah v. PP*). It is in evidence that as the door to the bus was not closed, when its driver SP3 lost control of the bus, the seat where the passenger was seated dislodged itself, thus she had flung out of the bus and found underneath the bus. It is clear that the bus driver

was also negligent in ensuring safety for the passengers, including the deceased to travel safely on it at all times. In total, the Magistrate had fallen into an error when he had failed to give sufficient consideration to all these facts before concluding on the guilt of the accused.

Oher Apparent Flaws

[21] The trial Magistrate had arrived at certain findings, which is unwarranted:

(i) At para. 13 of his judgment it is stated "Keadaan kereta OKT yang telah hilang kawalan menjadi punca yang telah menyebabkan kereta OKT membelok ke laluan lorong bas di sebelah kiri kereta OKT dan menghentam bas yang dipandu oleh SP3 sehingga terjatuh ke cerun bukit" – this finding was arrived at upon total reliance on testimony of SP1, SP2 and SP4 without hearing testimony of the accused who was in fact driving her car, at the relevant time. As alluded to above, the said witnesses who had testified were only at her back and did not for sure know what had caused the car to lose control.

(ii) At para. 17 of judgment, it is stated "Kerosakan teruk pada kereta OKT yang tertumpu di bahagian hadapan kiri kereta OKT ini pada hemat mahkamah menunjukkan bahawa telah berlaku hentaman yang kuat di antara kereta OKT dan bas yang dipandu oleh SP3 sehingga menyebabkan bas terjunam ke cerun bukit". This is again a finding made in the absence of evidence from the accused who had later testified that the bus had rear-ended her car, which led her to lose control and to hit the divider. Hence, the probability of the case seems to coincide with the extensive damage to her car, resulting in her car to lose control and hitting the divider and not the converse that as a result of the car hitting the bus, it had lost control and fell into a hill slope.

(iii) At para. 18 of judgment, it is stated "Justeru, pada hemat mahkamah keterangan SP9 turut konsisten dengan keterangan SP1, SP2, SP3 dan SP4 yang melihat sendiri kejadian kemalangan yang berlaku. Meskipun maggard hadapan bas tidak ditemui kerana telah tertanggal dari bas, namun fakta untuk menyatakan bas telah melanggar terlebih dahulu dan bergeser dengan belakang kiri kereta OKT pada hemat mahkamah adalah tidak munasabah". It is a fact that investigation of the case which was swift, rendering it near to an impossibility for the maggard which was dislodged from the bus not to be found. There is no evidence forthcoming from the investigation officer of the case (SP11) as to its whereabouts. It is a crucial piece of evidence, since it was case of the accused put as an early disclosure during prosecution stage, subsequently fortified by testimony of the accused in her defence, on oath that her car was grazed and rear-ended by the bus driver first when she was travelling, that had caused her to lose

control, thus colliding into the divider first before the bus. Forensic examination on the maggard by both chemist, SP9 and Puspakom officer, SP7 would have revealed the stain or paint marks of the car on it. Similarly graze marks found at the back left of the car was also not investigated. In that respect, it is unjustified for the Magistrate to conclude that the version of the accused is unreasonable. In any road accident the issue is never reasonableness of an occurrence, but it is always probabilities of the case which is always deduced from facts and circumstances at the scene of accident, supported by testimony of witnesses, including the accused.

(iv) At para. 20 of judgment, it is stated "Berdasarkan keterangan saksi-saksi pendakwaan ini, mahkamah berpendapat bahawa telah terdapat keterangan yang mencukupi bahawa OKT telah melakukan kesalahan yang dipertuduhkan ke atas OKT di dalam kes ini". This finding is illegal, as it is a fundamental error committed by the trial Magistrate, since there can be no finding of guilt of the accused at the end of prosecution case, in the absence of evidence from the accused. It is an incurable illegality pursuant to s. 422 of the Criminal Procedure Code (CPC; Act 593), which has again prejudiced the accused, occasioning a failure of justice.

(v) At the same paragraph, it is stated "Di dalam kes ini, SP1, SP2 dan SP4 tidak mengetahui sebab dan punca kereta OKT hilang kawalan sepertimana seringkali dipersoalkan oleh pihak pembelaan". *Albeit* that, the Magistrate had earlier at para. 13 had found that when the car lost control and collided into the bus, it had caused the bus to then overturn at a hill slope. But what had caused the car to lose control is still a question begging an answer at that stage of the case.

(vi) At the same paragraph, it is stated "Punca hilang kawalan dalam pemanduan boleh berlaku dalam pelbagai situasi samada disebabkan oleh defect pada fizikal kenderaan atau sikap pemandu kenderaan itu sendiri seperti tertidur (microsleep) atau kurang focus. Justeru, adalah munasabah untuk SP1, SP2 dan SP4 tidak mengetahui sebab dan punca kereta OKT hilang kawalan ketika kejadian." This is a misdirection by the trial Magistrate, as there is no evidence to support such finding. Pursuant to the body of evidence available, it would seem the trial Magistrate is filling an answer for the witnesses who do not know what had caused the car to lose control.

(vii) Additionally, the trial Magistrate had also not complied with s. 173(ha) CPC. It is salutary that the court after having ordered the accused to enter on his defence, shall read and explain the three options available under the law to the accused in person. This would include, her right to give sworn evidence in the witness box; give unsworn statement from the dock but she may call other witness to

support her defence, if any; and remain silent but to call other witness to support her defence, if any. This was not done in this case. The Deputy Public Prosecutor (DPP) arguing this appeal, had submitted that the non-compliance does not matter a jot, as the accused was represented by counsel at the material time. The DPP ought to be mindful that it is the accused who is facing the charge and not counsel. He merely represents her to advance defence available under the law for her to earn an acquittal of the charge. It is expected of the court to have ensured that the three options contained in s. 173(ha) CPC is read and explained to the accused personally. Her counsel is under no duty to make an election of the options available on behalf of the accused. He only advises the accused to do so in accord with facts, evidence and circumstance of the case. In fact, the *chapeau* to s. 173 CPC mandates court to comply with procedure laid down for summary trials, which would include s. 173(ha) CPC. In that regard, non-compliance with s. 173(ha) is also incurable rendering the trial a nullity, as decided by Her Ladyship Zaleha Yusof JCA (now FCJ) in the unreported case of *Hafizullah Abdul Samad v. PP* (MPRJ No. W05(M)-134-04-16).

(viii) Another patent flaw detected is the manner in which defence of accused was considered by the trial Magistrate. It is his bounden duty to strictly follow the dictates found in s. 173(m) CPC amplified by *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 and its sequel *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169. He has to consider the explanation by accused and if he rejects the said explanation, he has to determine on totality of evidence available in the case, whether there has been a reasonable doubt raised by her. If yes, an acquittal is justified, otherwise conviction shall follow. This is not enforced in this case. This is yet another infirmity which had materially prejudiced the accused, once again occasioning failure of justice.

Appellate Intervention

[22] In view of the foregoing, this court in exercise of its appellate jurisdiction, is convinced that there was no judicial appreciation of evidence proffered in the case by the trier of fact. The evidence proffered was not tested against relevant criteria, including circumstance which had led to the accident as well as probabilities of the case. It is also apparent the prosecution had failed to establish *vide* credible evidence that as a result of dangerous driving by the accused, she had created a dangerous situation. That is an objective test and when creating such a situation, the accused was at fault, also requiring an objective assessment. Alongside, there is also no assessment premised on the evidence available especially from SP3, the bus driver, that he had created the dangerous situation driving the bus at the

relevant time. He had in fact a better view of the road and vehicles around and ahead of him, including the Saga, but he had admitted he did not see the Saga at his side. He had forgotten he was in control of a vehicle laden with passengers, and because of his negligence, he had landed on a hill slope. In fact, he is more culpable than the accused.

[23] Thus, pursuant to the errors committed by the Magistrate on the facts, evidence and law, the finding of guilt and conviction of the accused is wrong in law. Hence, the conviction for an offence under s. 41(1) RTA and sentence of 30 months' imprisonment with effect from the date of conviction, 4 August 2020 and a fine of RM5,000, if not paid to be imprisoned for six months and for driving licence of the accused to be endorsed and suspended for a period of three months, is hereby set aside.

[24] However, on the facts and circumstances of the case involving the accused, although it does not disclose dangerous driving by her, it is abundantly clear premised on the same evidence available that the accused had been driving her car without due care and attention. So, bereft of all flaws in the case, alluded to above, in the interest of justice, she has in fact committed an offence under s. 43(1) RTA. Support for the position taken is found in the Indian Supreme Court case of *Ulkha Kolhe v. State of Maharashtra* (1964) 1 SCR 926, where it was decided that although undoubtedly the trial before the Magistrate suffered from irregularities and the evidence led was deficient on important aspects; that could by itself not be a sufficient ground for directing a retrial. The circumstances that should exist for warranting a retrial must be such that where the trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order of retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard. (See: *Ajay Kumar Ghoshal v. State of Bihar* (2017) 12 SCC 899). Nothing of that magnitude had taken place in this case. Moreover, I am mindful not to overlook the realities and the serious impact on the pending cases at the Magistrate's Court which are crammed and how an order of retrial would inflict hardship on the accused person who had taken all the trouble to reach this court and had advanced an appeal seeking justice in her case. (See by analogy: *Gangula Ashok v. State of AP* (2000) 2 SCC 504).

[25] In the premise, the appeal by the accused is allowed and pursuant to s. 316(b)(ii) CPC read together with s. 169(2) CPC, this court alters the finding made by the trial Magistrate and the sentence meted out against the accused. For the record, s. 41(4) RTA also allows for such an avenue during trial. The relevant provisions are:

> Section 41(4) RTA renders that the court may upon the trial of a person for an offence under this section convict such person of an offence under section 42 or 43.

Section 316(1)(b)(ii) CPC, provides that in an appeal from a conviction, court may alter the finding and alter the nature of the sentence;

Section 169(2) CPC states that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

Section 43(1) RTA provides that a person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and *shall on conviction be punished with a fine of not less than four thousand ringgit and not more than ten thousand ringgit and shall also be liable to imprisonment for a term not exceeding twelve months.

[26] In the upshot, the conviction of the accused is substituted for a conviction under s. 43(1) RTA. Having heard the parties on the aggravating factors and mitigation, the accused is sentenced to a fine of RM10,000, in default of payment, six months' imprisonment. Particulars of offence and conviction to be recorded into driving licence of accused by the Road Transport Department. Original finding of guilt and conviction under s. 41(1) RTA 1987 set aside and substituted with a conviction under s. 43(1) RTA 1987.